Supreme Court, U. S.
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No. 79-144

In the

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA ex rel.
ROBERT L. MERTENS,

Petitioner-Appellee,

vs.

ERNEST E. MORRIS, Warden,

Respondent-Appellant.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that the writ of certiorari issue to review the judgment of United States Court of Appeals for the Seventh Circuit originally entered in the instant case on June 25, 1979.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

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ROBERT L. MERTENS,

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vs.

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OPINION BELOW

On June 25, 1979 the United States Court of Appeals for the Seventh Circuit, Judges Wilbur L. Pell, Jr., Hardigan Wood Jr., and Walter E. Hoffman reversed by Order a petition for writ of habeas corpus that had been granted by Judge Prentice Marshall, United States District Court from the Northern District of Illinois, granting bail to Robert L. Mertens. Mr. Mertens had been convicted in the Circuit Court of McHenry County, State of Illinois of theft by possession and sentenced to a term of three to nine years in the Illinois Department of Corrections.

JURISDICTION

This Court has jurisdiction under the United States Constitution to review Orders entered by any United States Court of Appeals.

QUESTIONS PRESENTED

1. Was the action of the United States Court of Appeals, Seventh Circuit in reversing Judge Prentice Marshall's opinion granting a petition for writ of habeas corpus setting a state prisoner free on bail proper or does it violate the constitutional rights of Robert Mertens?

2. Does a federal judge have the constitutional authority to set bond for a defendant convicted in state courts, where the defendant is appealing his conviction in the state's appellate court, and who has what burden of proof in such proceedings?

CONSTITUTIONAL PROVISIONS EMPLOYED

The Eighth Amendment and the Fourteenth Amendment of the Constitution of the United States of America.

STATEMENT OF THE CASE

Robert L. Mertens was convicted of theft by possession and sentenced to a term of three to nine years in the Illinois Department of Corrections on August 8, 1977. Defendant appealed to the Illinois Appellate Court, Second District and that appeal is still pending. Subsequently a petition to set bail pending appeal was denied by the trial court (complete transcript is provided of that sentencing procedure and denial of bail in Appendix C), and also by the Illinois Appellate Court and the Illinois Supreme Court.

A petition for writ of habeas corpus was filed in the Federal District Court for the Northern District of Illinois. On June 2, 1978 Judge Prentice Marshall granted the writ of habeas corpus (complete transcript of that hearing provided in Appendix B). Subsequently the State filed a notice of appeal. Briefs were filed and oral argument was had before the United States Court of Appeals in the Seventh Circuit on April 3, 1979. On June 25, 1979 the United States Court of Appeals reversed Judge Prentice Marshall by an order (a copy of that order is attached hereto as Appendix A).

REASONS FOR GRANTING WRIT

Many United States Courts of Appeal have held that the Eighth Amendment which prohibits excessive bail is binding upon the States through the Fourteenth Amendment. *U.S. ex rel. Goodman* v. *Kehl* 456 Fed 2d 863 (2nd Cir.1972). Federal Courts of Appeal have also held that once a State has made a provision for bail pending appeal the arbitrary denial of that bail violates the Fourteenth Amendment. *U.S. ex rel Walker* v. *Toomay* 484 Fed. 2d 874, (7th Cir. 1973); *Pilkiaton* v. *Cir. Ct. of Howell County, Missouri* 324 Fed.2d 45 (8th Cir.1973). The same courts have stated that the burden in these cases rests with the defendant to show that the State Court has acted in an arbitrary fashion and that there is a presumption of regularity which attends to the proceedings. *U.S. ex rel. Walker* v. *Toomay,* 484 Fed. 2d 874, (7th Cir. 1973).

In the case at bar, two questions are presented to this Court, first whether a Federal Court judge has the authority to set bond on a defendant, who has been convicted in state court and has appealed that conviction to a higher state court, by the use of federal habeas corpus. This Court has never specifically held that such a right exists. Attendant to this question is the issue of who has the burden of proof and to what degree. The federal courts which had decided this issue have held that there is a heavy burden which rests with the defendant. It is respectfully submitted that this question is seriously in doubt and should be reviewed extensively.

A second question which arises in this case is whether the Seventh Circuit of Appeals erred in reversing the trial court's decision granting the federal writ of habeas

corpus. The facts of this case demonstrate that the defendant who had no appreciable criminal record of any type was convicted of theft by possession and received, as Judge Marshall phrased it, an "attention getting" sentence of three to nine years (Appendix B, Page 7a). The transcript, which is attached in Appendix C, of the sentencing procedure of this Petition unquestionably shows that the trial judge was not even aware that he had the authority to set the bail pending appeal. When so informed he in a very arbitrary fashion merely said he was exercising his discretion to deny it. (Appendix, Page 18a-19a) The trial judge then made a statement that bail would be set automatically by the Illinois Appellate Court. (Appendix C, Page 20a) It is respectfully submitted that as Judge Marshall put it in the trial court the transcript was "bizarre" (Appendix B, Page 6a) and that there was no more that a defendant could do to show that there was an arbitrarily denial of the right to set bail as has been shown in the instant case. Judge Marshall in granting the writ noted that in his many years as a federal judge he had never before granted a writ of habeas corpus, setting bail for a state prisoner, (Appendix B, Page 7a) but he felt that a petitioner could not possibly make a stronger case than had been made by the transcript of the bail hearing in the case at bar.

CONCLUSION

Wherefore Petitioner-Appellant respectfully prays that this Honorable Court entertain a petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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JAMES R. TRUSCHKE,
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Argued April 3, 1979 — June 25, 1979.

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
WALTER E. HOFFMAN, *Senior District Judge**

No. 78-1804
UNITED STATES OF AMERICA ex rel.
ROBERT L. MERTENS,
Petitioner-Appellee,
vs.
ERNEST E. MORRIS, Warden,
Respondent-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois
Eastern Division
No. 77 C 4353
PRENTICE H. MARSHALL, *Judge.*

* Senior District Judge Walter E. Hoffman of the Eastern District of Virginia is sitting by designation.

ORDER

This is an appeal from an order of the district court granting the petitioner's petition for habeas corpus. The petitioner had been convicted of six felony and three misdemeanor counts of theft following a state court jury trial. The state court judge sentenced him to three to nine years of incarceration. The petitioner appealed his conviction to the Illinois Appellate Court where the appeal is currently pending. The state trial court denied him bail pending appeal as did the Illinois Appellate Court and the Illinois Supreme Court. He then filed his habeas petition in the district court alleging that he should have been released on bond pending appeal. The district court granted his petition on the ground that there was no rational basis for the state court's denial of bail pending appeal and, accordingly, that the denial violated the petitioner's constitutional rights.

This court has recently reiterated the law in this type of case:

> In cases in which the state court has not thoroughly or even summarily articulated its reasons for denying bail pending appeal, federal courts in a habeas proceeding must afford the state court a presumption of regularity. *U.S. ex rel Walker* v. *Twomey,* 484 F.2d 874, 876 (7th Cir. 1973). The burden is on the petitioner to show that the record is devoid of a rational basis for the denial.

U.S. ex rel. Sampson v. *Brewer,* 593 F.2d 798, 799, (7th Cir. 1979). The sole issue in the present case, therefore is whether the district court erred in its determination that the record was devoid of a rational basis for denial of bail pending appeal.

Our review of the record indicates that there was a rational basis for the bail denial, and we are thus of the opinion that the district court erred in granting habeas relief. The presentence investigation report contained information which could provide a rational basis for bail

denial.[1] This report indicates the petitioner's involvement in several unlawful activities. On March 4, 1975, he was arrested and later given one year probation for driving with a revoked driver's license. On May 2, 1975, he was arrested for unlawful possession of hashish. He was either found guilty or pled guilty and was fined. On April 23, 1977, he was arrested for the unlawful use of a driver's license and disorderly conduct. According to him, the disorderly conduct was dropped, but the traffic offense is still pending. He explained that the April 23, 1977, arrest stemmed from his altering the age on his driver's license so that he could benefit from the age 21 and over alcohol laws.

Although no single activity listed in the presentence report could be considered gravely serious criminal conduct, the totality indicates a pattern of disregard for the law. The report also indicated that the petitioner desired to relocate in Florida or on the East Coast, and that his earlier plans to assume greater responsibility in his father's printing business in Illinois no longer seemed likely. Furthermore, the seriousness of the crime for which he had been convicted may be considered in determining whether a rational basis for bail denial exists. *See U.S. ex rel. Sampson* v. *Brewer, supra.* He was convicted of felony and misdemeanor thefts which included a pattern of thefts over a five year period. Viewing these circumstances in their totality, we cannot say that the record is devoid of a rational basis for denial of bail pending appeal.

---

[1] The petitioner argues that the trial judge never read the presentence report and thus could not have relied on it in denying bail. The only support for this allegation is a statement made by the trial judge that, "I don't know their past histories." This statement is not conclusive proof that the trial judge did not read the report. We do not interpret the statement as does the petitioner because the trial judge signed an acknowledgment stating that he had read the presentence report.

The petitioner emphasizes statements of the state trial judge at the bail hearing indicating some confusion over whether he had discretion to set bond pending appeal. When the judge was informed that he had that discretion, he stated that he would exercise that discretion by denying bail to the petitioner. A cold reading of the transcript of this hearing does not suggest that the judge thoughtfully pondered over his decision, nor, conversely, does it indicate that his decision, albeit apparently hasty, was devoid of a rational basis.

As we noted in *Sampson*, 593 F.2d at 799-800,

> We are not unmindful of the strong federal judicial policy in favor of release on bail pending appeal unless the appeal appears to be frivolous or dilatory. We are here concerned, however, not with federal criminal proceedings but with ongoing state court criminal proceedings in which we, not being persuaded that the state court acted arbitrarily, decline to intervene.

Accordingly, the order of the district court is reversed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
ex rel GORDON MERTENS, JR.,
and ROBERT MERTENS,

Petitioners,

vs.

ERNEST E. MORRIS,

Respondent.

No. 77 C 4353

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE PRENTICE H. MARSHALL, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Wednesday, June 28, 1978, at 9:30 o'clock a. m.

PRESENT:

JAMES TRUSCHKE, Esq.,
on behalf of petitioners;
HON. WILLIAM J. SCOTT,
Attorney General, State of Illinois, by:
THOMAS CROOKS, Esq.,
Assistant Attorney General,
on behalf of respondent.

The Clerk: 77 C 4353, Gordon Mertens, Jr., vs. Ernest Morris, for ruling.

Mr. Truschke: Good morning, your Honor. For the record, my name is James Truschke, T-r-u-s-c-h-k-e.

Mr. Crooks: Good morning, your Honor. Thomas Crooks for the respondent.

The Court: I was going to rule on this yesterday, and the reason I asked you fellows to come in is to ask the petitioner—well, I have two things on my mind.

Number one, do you agree that there is no need to grant Gordon any relief in view of the fact that he went over the hill?

Mr. Truschke: Judge, I wouldn't quite phrase it that way.

The Court: How would you phrase it?

Mr. Truschke: In view of that other conviction, I would agree with that statement by your Honor.

The Court: Well, that's what I mean.

Mr. Truschke: Yes, your Honor, I would agree.

The Court: I think it affects the exercise of my discretion, but in view of the fact that he is going to be in custody for those two years regardless, why, we will grant the respondent's motion for summary judgment as to Gordon Mertens.

Now, as to the other boy, what kind of a bond are you suggesting that I grant, and what do you suggest the terms of it to be? I have had a couple of these cases in the past, but I have never granted the relief. I am really troubled in Robert's case. I realize that Federal District Judges should really be very reluctant before they intrude themselves into State Court proceedings at this state of the proceedings. I think that this is far more sensitive than post conviction habeas relief.

But I have read the Walker case that the respondent cites to me, and I have—I perceive, you know, the debate that existed once upon a time between Judge Will on the one hand, and Judges Napoli and Decker on the other.

I recognize that the Court of Appeals has established a burden of proof as being on the petitioner. Let's see if we can find the exact quote in here.

> "The petitioner must bear the burden of showing that the record provides no rational basis for the decision."

But I read some bizarre transcripts in my life, but I must say I have never read one quite as bizarre as the

one before Judge Herman the day that bond was being discussed about these young men.

Mr. Truschke: Your Honor, I have read the entire transcript, consisting of 4,500 pages, which I just got.

You know, this case was strange from the start. I called the court reporter—

The Court: Wait a minute, let's not get into that. You have got the transcript now, and that's one of the grounds—

Mr. Truschke: I've got it, your Honor, and I can tell you, it is quite bizarre, the things that went on at the trial.

The Court: Here is a young man, never been convicted before, convicted of theft by possession. It's none of my business what the sentence was in the case, but the three to nine sounds—well, let's put it this way: *Three to nine is an attention-getting sentence in the circumstance of the case.* But when he is asked to set bond by Mr. Zimmerman, as I read the transcript, his first reaction is, "Well, I don't have the authority to set bond." The notice of appeal has been filed, and he seems quite startled when the lawyer tells him that he does have the authority to set bond. And then he just says, "Well, if it's addressed to my discretion, I exercise my discretion and deny it."

"I don't know what more a petitioner in these circumstances can do to demonstrate that the record provides no rational basis for the decision." And that is what the Court of Appeals has told us, that we look to the record to determine whether it provides a rational basis for the decision. I just don't see any in this case.

I really think this young man is entitled to relief, but I get back again to what should be the terms of the relief. What do we do in a case like this? What kind of a bond do I set? What are the conditions of the bond? Who supervises him?

Mr. Truschke: Your Honor, prior to trial, the defendant was granted a $2,000 bond, $2,000 cash. It was a $20,000 bond where he put up 10 percent or $2,000.

As I point out in my motion, the defendant has never had a bond forfeiture in any case, has never had any prior convictions of any type. I think he is an excellent candidate for a bond. I suggest that the terms of the bond be that he stay within the State of Illinois.

I would be happy to go with any supervisory type of order that your order would care to issue. I don't really think we need one in this case, though.

The appeal—I am going to file probably for one extension of time, your Honor, because—just because of the volume of the transcript. It is 4,500 pages. I was going to do a designation of excerpts of the record, and I found I cannot do it. It would be just too thick, so I am going to have to create an abstract which will just be a little longer.

My brief will be filed 45 days from today's date, so I expect the appeal to proceed relatively quickly.

The Court: I don't know what the conditions are out in the Second District these days. They, I think, have probably kept abreast as well or better than any District in the state, with maybe the possible exception of the Fourth.

Well, what does the State say—I realize you do not agree with the generality of my ruling, but what do you say with respect to the bond, and the conditions of the bond, and to whom the bond runs?

Mr. Crooks: Well, your Honor, there was a $20,000 prior to trial. Now, the presumption—

The Court: $2,000 cash.

Mr. Crooks: Right. But with the same 10 percent cash to be put down, I would expect that the $20,000 should be raised now. He has been convicted. There is a presumption that his conviction was valid until the court over-turns that conviction.

I would ask—I don't think $30,000 would be an unreasonable bond in this case.

I would also feel that if the writ is issued, and he is released on bond, there should be some sort of reporting system, perhaps informal—just a letter to me on a monthly basis perhaps, so that we can keep tabs on Mr. Mertens.

The Court: Well, now, look, I'm not going to be here on Friday—I mean after Friday. I will be available through my office; that is to say, I will be getting mail and things like that.

I think that you men should sit down. I suppose his parents will post the bond, will they not?

Mr. Truschke: Yes, your Honor.

The Court: Did the mother ever make bond, by the way?

Mr. Truschke: Yes, your Honor.

The Court: That's thoughtful. How old are the parents?

Mr. Truschke: Your Honor, the father is in court, if you would like him to appear.

The Court: I was just curious as to how old they are.

Mr. Truschke: About 55 years old.

The Court: Did the mother get bond in the Appellate Court?

Mr. Truschke: Yes, your Honor, she did.

The Court: But the boys didn't?

Mr. Truschke: No, they did not. It was denied in the Appellate Court.

Your Honor, there was a very routine motion filed by another attorney who took a form look and just pled some names and facts.

The Court: I understand.

Mr. Crooks: Your Honor —

Mr. Truschke: I don't think it was presented in the right way to the Appellate Court, or else we wouldn't have to be here today.

Mr. Crooks: The very fact that the mother did receive bond in the Appellate Court shows that the Appellate Court—it indicates that they took a look at it, and they drew a line someplace.

The Court: Well—

Mr. Truschke: Judge, could we do this—

THE COURT: You know, I mean that I realize the sensitivity of this situation. But as I review the record, there is just—I parrot the language of the Court of Appeals. I truly perceive from the search of the record in this case—I perceive no rational basis for a refusal to admitting to bail, and the case law holds that if bail is available to persons pending appeal, that the refusal of it, the due process clause, mandates that the refusal of it be rationally based.

MR. TRUSCHKE: Judge, may I suggest this—

THE COURT: If they had increased the bond to a degree, or something like that—but to deny bond in a case of this kind is just—I just can't understand it.

So I will make it 30, $30,000. The parents can come up with $3,000, I suppose.

Now, look, though, I think that you men should sit down and figure out what kind of an order you are going to need. You are going to need — I assume is down in Stateville.

MR. TRUSCHKE: No, one boy is in Stateville — that is Gordon, your Honor. Robert is now at Sheridan.

THE COURT: Well, Robert — we are denying relief as to Robert.

MR. TRUSCHKE: No, Gordon you are denying relief as to.

THE COURT: Robert is at Sheridan?

MR. TRUSCHKE: He's at Sheridan, your Honor.

THE COURT: Well, the Warden down there isn't going to let him out on a phone call.

MR. TRUSCHKE: True, your Honor.

THE COURT: So you are going to have to have an order for the Warden. You have got the logistical problem of him signing the bond. How is he going to sign the bond? You have the posting of the bond.

I suppose the bond should be posted here.

MR. TRUSCHKE: In Federal Court?

THE COURT: Yes, sir.

MR. TRUSCHKE: Okay.

THE COURT: He's out on my bond. If he violates it, he has got me to contend with.

I suppose that's it. But you fellows may want to think that over.

MR. CROOKS: That is the procedure —

THE COURT: You know, as I say, I have had a couple of these in the past that I have denied. Well, that's simple. The Clerk just enters an order denying it.

I cannot recall ever having granted one.

MR. TRUSCHKE: Judge, suppose this afternoon I had the bond posted here in Federal Court, and I had an order directed to the Warden out at Sheridan —

THE COURT: How is he going to sign the bond? He's in Sheridan.

MR. TRUSCHKE: Judge, could his father sign it in his stead?

THE COURT: I suppose the father is going to come up with the scratch, but it is the boy's undertaking.

Have you been through this before? Have you had a prior instance?

MR. CROOKS: The only — it was a similar case before your Honor, the Franklin Thomas case.

THE MARSHAL: You have to writ him in, issue a writ and bring him in.

THE COURT: They writ him in.

MR. CROOKS: That's what I suggest. If we writted Mr. Mertens up for Friday, and then we could just have an order prepared by that time and go through having him sign the bond at that time.

THE COURT: If you can get him up here by Friday, that's fine. The Marshals can't get him by Friday. If you can get me the order —

MR. TRUSCHKE: Possibly the easiest way is if Mr. Crooks — or your office can have the writ down there, it's going to be a lot easier for your office to get him back there.

MR. CROOKS: We don't have people going back and forth, and the mails are the same speed for us as anyone else. We can't make a phone call and have the warden release anyone either. Someone is going to have to go there with an order signed by your Honor.

THE COURT: Look, you fellows sit down and figure out how you want to do it, and get men the order. I will sign the order. And my Marshal says the thing to do is writ him up here, have him execute the bond here, and we will release him. That sounds like the way to do it.

But we are running on a tight schedule. Now, Judge Crowley and Judge Flaum are going to be hearing whatever emergencies I have, and if you get me the orders —

MR. TRUSCHKE: Judge, let me sit down with Mr. Crooks today.

THE COURT: I can get the order signed if you can get the boy writted up here. But you won't need me. But I am going to be departing Friday evening.

MR. TRUSCHKE: The only question is, logistically, can we get the writ down to Statesville, and have Statesville — or have Sheridan bring him up here by Friday.

THE COURT: Well, as I say, I don't think it is as important that he be here by Friday as it is that you get the papers to me by Friday.

MR. CROOKS: If we had him brought up next week and then —

THE COURT. It could be returnable before Crowley or Flaum. When he comes here, all he is going to do is sign the bond, right?

MR. TRUSCHKE: Yes, your Honor.

THE COURT: Okay. So get the orders prepared, and get them in to me.

MR. TRUSCHKE: Thank you, your Honor.

Which were all the proceedings had in the above-entitled matter on the day and date aforesaid.

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4353

UNITED STATES OF AMERICA
ex rel GORDON MERTENS, JR.,
and ROBERT MERTENS,

Petitioners,

vs.

ERNEST E. MORRIS,

Respondent.

CERTIFICATE

I HEREBY CERTIFY THAT the foregoing transcript, consisting of pages 1 to 12, inclusive, is a full, true and accurate transcript of the official shorthand notes taken upon the hearing of the above-entitled cause on Wednesday, June 28, 1978.

/s/ RICHARD H. DAGDIGIAN,
RICHARD H. DAGDIGIAN,
Official Shorthand Reporter,
United States District Court,
Northern District of Illinois.

APPENDIX C

STATE OF ILLINOIS)
) SS:
COUNTY OF McHENRY)

IN THE
NINETEENTH JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

76 CF 1201

THE PEOPLE OF THE
STATE OF ILLINOIS,

Plaintiff,

vs.

GORDON D. MERTENS, SR.,
MARCELLA MERTENS,
ROBERT L. MERTENS, and
GORDON D. MERTENS, JR.,

Defendants.

REPORT OF PROCEEDINGS

had in the above-entitled cause before the Honorable ROLAND A. HERRMANN, Judge Presiding, on Monday, August 8, 1977 at 9:30 o'clock a.m.

APPEARANCES:

William J. Cowlin,
State's Attorney of McHenry County,
By: Lawrence K. Johnson,
Assistant State's Attorney,
for the People;

Arthur Zimmerman,
for the Defendants.

THE COURT: What are we here for?
MR. ZIMMERMAN: A few things, judge.
THE COURT: Remand?
MR. ZIMMERMAN: Not yet.
One thing that has to be —
THE COURT: You are waiving notice or whatever he's got here?
MR. ZIMMERMAN: Yes.
MR. JOHNSON: Oh, yes.
This is just — I assume one of the things is notice of appeal.
MR. ZIMMERMAN: Right, judge.
If I might first —
THE COURT: What do you want first now?
MR. ZIMMERMAN: Let me file notice of appeal on behalf of Gordon Mertens, Sr. —
THE COURT: Do you want this one signed? Yes, that's the original. All right. Notice of Appeal filed, Gordon Mertens, Sr.
MR. ZIMMERMAN: Right.
THE COURT: Second District Appellate Court, —
MR. ZIMMERMAN: Marcella Mertens —
THE COURT: — Elgin.
Notice of Appeal filed, Marcella Mertens, Second District Appellate Court, Elgin.
MR. ZIMMERMAN: Robert Mertens.
THE COURT: Notice of Appeal, Robert Mertens.
MR. ZIMMERMAN: And Gordon Mertens, Jr.
THE COURT: And Gordon Mertens, Jr. All right.
MR. ZIMMERMAN: Secondly, your Honor, I'm going to ask you to set bail pending appeal on behalf of each defendant. I have separate motions.
THE COURT: Are these all the same though?
MR. ZIMMERMAN: They are similar. There are some differences.
THE COURT: Motion to set bail pending appeal, Gordon Mertens, Sr., Marcella Mertens.
Robert and Gordon, Jr?
MR. ZIMMERMAN: Yes. I have filed affidavits attached to the motions signed by myself.

THE COURT: State has copies or will get them?

MR. ZIMMERMAN: I'm giving them now, judge, so that fact might be slightly different, one being a household head and the other not being head of the household, some working and some not.

THE COURT: What's the theory on Gordon, Sr.?

MR. ZIMMERMAN: Well, he's out, judge. But, rather than being out on a recognizance for probation we'd ask your Honor to make that recognizance bond an appeal bond.

THE COURT: Oh, I see.

MR. ZIMMERMAN: Would be appropriate. I agree with your Honor that he's not in custody physically.

MR. JOHNSON: Your Honor, I think the statute authorizes that the bond on the case be transferred as an appeal bond. Since he's out, we really have no objection to that for Gordon, Sr.

As to the costs, the costs have to be taken out of the bond, but I think — it is not clear, but when they file a notice of appeal it would seem that the whole thing is deferred until after the appeal is settled.

THE COURT: What's deferred?

MR. JOHNSON: Well, the —

MR. ZIMMERMAN: The costs —

MR. JOHNSON: — the costs, because you can't assess costs.

MR. ZIMMERMAN: If it was reversed, for whatever reason it might be reversed, then the costs would not be chargeable to the defendant.

THE COURT: All right.

MR. ZIMMERMAN: Although it would be appropriate for your Honor to enter —

THE COURT: Yes

MR. ZIMMERMAN: — a judgment for costs.

THE COURT: I will for costs. I don't think there is any argument on that. I decided that last week.

You want to make a statement about that yet and then there is no objection by the state of Gordon Mertens, Sr.?

MR. JOHNSON: Well, I think it is appropriate, your Honor. There's no objection on Gordon Mertens, Sr.

THE COURT: That's allowed, Gordon, Sr.

MR. ZIMMERMAN: On Gordon, Sr. may that be a thousand dollar recognizance bond, judge?

THE COURT: Yes.

MR. JOHNSON: What was the one he had before? Is that the same amount?

MR. ZIMMERMAN: You mean on the probation?

MR. JOHNSON: Well, the bond that he had on the other cases.

MR. ZIMMERMAN: That would have been more —

MR. JOHNSON: I would ask that — All right. I'll withdraw that. I think that's proper.

THE COURT: I don't think there is a difference between a thousand or five thousand or ten on that. Just so he has a bond on file. Make it a thousand dollar recognizance.

MR. ZIMMERMAN: There's several on those, judge. If you want a new one we'll make a new one.

THE COURT: Give me a recog bond. He can sign a new one for that.

MR. ZIMMERMAN: Thank you.

THE COURT: All right.

Do you want anything further other than your written notion before he responds?

MR. ZIMMERMAN: I don't know if you want arguments, judge. I just might state, if we can, that Marcella next, the —

THE COURT: What's their current address?

linois.

THE COURT: What's the zip?

MR. MERTENS: 60010.

MR. ZIMMERMAN: 98 Rainbow Road, Barrington, Il-

THE COURT: This is 1216? I should know it by heart.

MR. ZIMMERMAN: 1201.

Next would be Marcella, your Honor.

THE COURT: All right, Marcella, motion to set bail pending appeal.

MR. ZIMMERMAN: Yes, your Honor.

By virtue of the sentence imposed by the Court being a probation with the first six months in the McHenry

County Jail, I would suggest to the Court that it would not be unreasonable for the Court to set a thousand dollar recognizance bond on her appeal as well. She being a housewife, living with Gordon all these years, she certainly is not going anywhere. Sentence is not severe that it would cause her to do anything inappropriate with respect to the community or the Court, whether she served — started serving today or started serving six, eight months from now when appeal might be handed down, if adverse, would not affect the community adversely or in any way. And I do think it is appropriate in this case.

THE COURT: Mr. Johnson . . .

MR. JOHNSON: Well, appeal bonds are always within the discretion of the Court. It is not mandatory. I agree that she propably isn't — probably isn't going anywhere, but, on the other hand, she has a lot more to lose than her husband since she's going to be in jail for six months if she isn't successful here. So, I would think the Court should take that in consideration.

The Court could either transfer some of the other bonds or set it as a recog as he said or else set a new bond. I think it is within the discretion of the Court here.

THE COURT: What are the grounds or discretion or the Court to consider on the bail bond? Seems to me the Appellate Court, if the notice of appeal filed is out of my hands and the Appellate Court sets it —

MR. ZIMMERMAN: No, judge.

THE COURT: Huh?

MR. ZIMMERMAN: Not really.

THE COURT: No?

MR. ZIMMERMAN: Always appropriate for the Trial Court to set an appeal bond. And it's only where the Court refuses to do so or sets a bond so excessive as to amount to no bond at all that the Appellate Court should ever become involved in a bail sentence.

THE COURT: Appeal bond —

MR. ZIMMERMAN: The Appellate Courts believe the Trial Courts set bond within their discretion, that makes sense. I certainly would think that at the very worse the Court could transfer one of the bonds now existing on be-

half of Marcella Mertens as an appeal bond. The original bonds were very high, judge.

THE COURT: Well, there's some seven thousand dollars or more. So, must have been — normally we set five on a theft over. But — so, that would be six times five is thirty — thirty thousand — that be three theft under are a thousand — I would assume there must be some three or four thousand on each defendant.

MR. ZIMMERMAN: Were there adequate time initially, I would have thought it would have been even more appropriate to have a real estate bond in this case, frankly. But, there are some — you are correct, there's at least seven thousand dollars posted.

THE COURT: Cash.

MR. ZIMMERMAN: On behalf of the various defendants evidencing some seventy-thousand or more in bonds.

THE COURT: Anything else on Marcella?

What about Robert and Gordon, Jr.?

MR. ZIMMERMAN: That's why I was taking th[illegible] individually judge, so I would know what to do wi[illegible] respect to the bonds.

Quite frankly, I didn't think Gordon, Sr., would be a problem, but I was looking for an indication as to whether the Court would —

THE COURT: I'm going to deny them. I just can't see I should be in this any more. The Appellate Court can consider it. I gave a sentence that's no vindictive. I think I had the duty to sentence them. I don't know their past history. She had one thing on shoplifting years ago which I hardly considered, but I have never set too many bonds in a trial court.

If it's discretionary, I'm going to use the Court's discretion and deny them.

MR. ZIMMERMAN: It's not discretionary on setting a bond, judge. What is discretionary is the type of bond and the amount of bond.

THE COURT: I know. But I'm not going to set an appeal bond. I'm going to deny it on Gordon, Jr., and Robert and Marcella. She's remanded.

MR. ZIMMERMAN: Judge, would you do me the courtesy of staying the mittimus on Marcella Mertens for a few days so I can make a motion in the Appellate Court?

THE COURT: I did it last — I did that Wednesday.

MR. ZIMMERMAN: Judge, that —

THE COURT: Until today.

MR. ZIMMERMAN: That didn't give us an opportunity to go into an Appellate Court to get a bond set. You know they're certainly going to set an Appellate bond on behalf of Marcella Mertens and they'll most likely set one on behalf of the two sons. But —

THE COURT: They do it automatically if the Trial Court denies it.

MR. ZIMMERMAN: Yes, sir.

THE COURT: They do, is that right?

MR. JOHNSON: Well, they will consider each case.

MR. ZIMMERMAN: As long as it's not a capital case and a bond will be set and it will — most times be very reasonable.

All I'm asking the Court to do is accept — either take her personal recognizance or take one of the bonds that's up on her behalf and convert that to an appeal bond for purposes —

THE COURT: No, I'm not going to. Twenty-nine-day trial and serious thing. I'm going to remand her to the custody of the Sheriff.

MR. ZIMMERMAN: Excuse me, your Honor. You are also denying us further time on her behalf?

THE COURT: Yes.

MR. ZIMMERMAN: I have on other motion this morning, judge. On behalf of Gordon, Jr., and Robert I'm asking for the Court to order a transcript as they are totally indigent at this point. The monies —

THE COURT: How do we find this out?

MR. ZIMMERMAN: Well, I'll represent to the Court either under oath or as an officer of the court that all of the monies posted as bond on their behalf were posted by Gordon Mertens, Sr. He's present in court to respond. All of the attorney's fees, with exception of a few dollars were paid by Gordon Mertens, Sr.

THE COURT: Hasn't been working. Robert was working down at the label shop.

MR. ZIMMERMAN: For his father.

THE COURT: For his father. And Gordon, Jr. never did work the last five years.

MR. ZIMMERMAN: That's correct.

THE COURT: However you argue it.

Now, you are arguing that he doesn't work, he hasn't worked for the last five years, say he's indigent, but during the course of the trial, I think, there was a strenuous argument made that he was self-employed at home.

MR. ZIMMERMAN: That's right judge. And he did earn monies. He earned enough that he spent —

THE COURT: Two-edged sword.

MR. ZIMMERMAN: Test of indigency is whether he has bank accounts or one has any tangible assets.

THE COURT: Trusts, cash.

What do you say, Mr. Johnson?

MR. JOHNSON: As far as transcript, no question that the parents can afford to pay for the transcript and it's going to have to be typed up anyhow. And for that reason I don't see that there's any necessity having the State pay for the transcript for the two boys. They're going to have it anyhow on the parents. And as far as their indigency, I don't think there's any proof of that yet. I think they have to at least submit affidavits as to their indigency so it is on the record.

THE COURT: Well, yes. What's going to happen is Gordon, Sr., and Marcella get a free transcript by claiming that the sons are now indigent.

MR. ZIMMERMAN: Judge, aside from the monies now posted as bond, Gordon, Sr. and Marella are temporarily without funds, they are sitting on real esate that's worth money, but they have exhausted their finances during this trial.

His business has been bad because of his absence for a period of a month or more during the trial. There are no funds available on his behalf at this time short of selling the property which he's been trying to do. That doesn't affect the right of Gordon, Jr., and Robert to have an appeal whether their father appeals his case or not. And

he may in fact abandon his appeal. That's no certainty in this case.

The Court: They may all —

Mr. Zimmerman: They may all. But, in any event, as fas as the two young men are concerned —

The Court: But the Court is between the rock and a hard spot on this one because if they get free transcripts by the state and they can appeal for Robert and Gordon, Jr. —

Mr. Zimmerman: Judge—

The Court: And let their appeals go by the board, they are free.

Mr. Zimmerman: No different than the rock throwing case where all the young—the young man went to trial, had private counsel.

The Court: Did he get a free transcript?

Mr. Zimmerman: Yes, sir.

And on the same basis that he was then indigent, that fees prior to that time had been paid for by family and friends, but the boy himself was indigent. We have the same situation.

The Court: Do you get paid if you write it up, George, either by the Government or by these folks?

Comes out of my pocket.

Mr. Zimmerman: Comes out of all our pockets, judge.

The Court: What's the legal basis, Mr. Johnson? Do you have any remarks or argument on this?

Mr. Johnson: I just don't know that they are indigent. That's the main thing.

The Court: Then I suppose Mr. Zimmerman would request that they be returned to the court.

Mr. Zimmerman: Precisely.

The Court: To the courts for interrogation.

Mr. Zimmerman: I was shocked they were not here, judge. Last week when I talked to the Sheriff they indicated they would be here today. That's the reason I didn't send a formal notice of motion right that day to have them here.

The Court: Well, you don't need it today. I think we'll consider that on affadavits at a later date. I'll reserve on this. I'm going to be gone a week.

Mr. Johnson: I think the defendants can submit affadavits without appearing and Court could act upon—

Mr. Zimmerman: Will the Court accept my representation or the testimony of Gordon, Sr., in ruling on this motion?

The Court: What do you say about that, Mr. Johnson? You talk about a transcript and the record?

Mr. Zimmerman: Yes, sir.

The Court: They don't need both of it, Mr. Johnson.

Mr. Zimmerman: You always need a common-law record.

Mr. Johnson: Yes, you need both.

Mr. Zimmerman: But the record is not an expensive proposition, the transcript is.

The Court: I suppose if they ever pay the costs and they lose the appeal, why, we'll get some of the money back.

Mr. Zimmerman: That's correct, judge.

The Court: Are you opposing it yet on the basis you don't know if they are indigent, Mr. Johnson?

Mr. Johnson: Your Honor, I'm not entirely familiar with the procedure on getting the record. And in cases which is an indigent appeal, I'd just like a little time to read the statute.

The Court: I hate to bring you out again. Can you get something by Friday morning, a written affadavit? I'll consider it then, Friday morning at 9:30. You don't have to come out if you send it.

Mr. Zimmerman: I don't know how I can physically obtain an affadavit from them.

The Court: When they are in transit?

Mr. Zimmerman: That's right. I don't even know where they are at right now, quite frankly.

The Court: I don't either.

We'll recess for 10 minutes. Mr. Johnson is going to study some law.

(Whereupon, a short recess was taken after which the following proceedings were had):

The Court: Any further argument on the motion of indigency of Robert and Gordon Mertens, Jr.?

Mr. Johnson: Yes, your Honor. The only thing that seems to be in issue is whether or not they should get a free report of the proceedings and free transcript here. And if you look at—

The Court: Let me look at 605 and 608.

Mr. Zimmerman: 605 through 608.

Mr. Johnson: Expecially 607B. Halfway down there. That seems to be the provision which covers the situation. Says:

> "If the judge who imposed sentence or entered the order invoking probation or conditional discharge or modifying the conditions—"

Well, actually, that only applies to probation, apparently, but anyhow, says:

> "In his absence—"

The Court: Where are you reading from?

Mr. Johnson: About the middle on B.

The Court: 607B?

Mr. Johnson: Uh-huh.

> ". . . . finds that the defendant is without financial means with which to obtain the Report of Proceedings at his trial or hearing, he shall order the court reporter to transcribe an original and copy of his notes."

However,—All right. That would be the provision which would be the—the defendant, Gordon, Jr., and Robert, which are critical here is Court has to find that the defendant is without financial means by which he can obtain a report of proceedings.

We have a unique situation in this case where the parents will also be getting the same thing typed up by the court reporter and, therefore, I would think that that would be the—the defendant, Gordon, Jr., and Robert means by which to get this transcript.

The Court: If the Court allows indigency for the record and the transcript for Robert and Gordon, Jr., who

is going to handle the appeal? I assume the State Appellate Defender.

Mr. Zimmerman: Not necessarily, judge.

Mr. Johnson: Right now Mr. Zimmerman has filed the Notice of Appeal.

Mr. Zimmerman: I have advised Gordon, Jr., long before the trial was concluded that I would follow through on an appeal on his behalf and on behalf of Robert because I felt responsible for Robert's involvement. That has nothing to do with the parents and has—

The Court: I know that.

Mr. Zimmerman: If they were four different names—

The Court: We have every day here a 17-year-old comes in, father is maybe a millionaire—

Mr. Zimmerman: Exactly.

The Court: If they have no assets they are indigent and get a public defender.

Mr. Zimmerman: The mere fact that I'm volunteering my time to work on the boy's appeal—

The Court: If you volunteer to handle it as the legal aide, why, I commend you for that.

Mr. Zimmerman: Unfortunately, I did too much free work.

The Court: I don't see anything else.

The Court sentenced them already in the Department of Corrections' custody, I don't see how the Court can logically say they are not indigent and they can't be out on bond to work to pay for their own transcript.

Mr. Johnson: I just don't see how the boys are without financial means to obtain a Report of Proceedings here because it's going to be typed up anyhow.

Mr. Zimmerman: You are making an assumption that's not necessarily true.

The Court: He may drop the appeal of Gordon Mertens, Sr., and Marecella.

Mr. Johnson: Would be appropriate at that time for the Court to order it and State pay for it. I don't think it is appropriate until then.

The Court: All right. The order is entered.
Mr. Zimmerman: Thank you, your Honor.
The Court: For Gordon and Robert.
And the bail is denied by this Court. Marcella is remanded to the custody of the Sheriff.

Court is adjourned.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)